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No. 96-647

In The

Supreme Court of the United States

October Term, 1996

THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a State Agency, and LAWRENCE FUCHS, Executive Director of the Department of Revenue,

Petitioners,

vs.

SHARE INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. WHETHER RECONSIDERATION SHOULD BE GIVEN BY THIS COURT TO THE DECISION BELOW WHICH PROPERLY APPLIED THE DOCTRINES ENUNCIATED IN *QUILL* AND CONCLUDED THAT THE PRESENCE OF A VENDOR'S PRODUCTS AT A SEMINAR IN THE STATE OF FLORIDA FOR THREE DAYS EACH YEAR FAILS TO SATISFY THE "SUBSTANTIAL NEXUS" REQUIREMENT OF THE COMMERCE CLAUSE.

LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of this Court, respondent Share International, Inc. states that it has no parent corporation or subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Share International, Inc. ("Share") respectfully requests that this Court deny the petition for writ of certiorari filed by the petitioners The Department of Revenue of the State of Florida, a State agency, and Lawrence Fuchs, Executive Director of the Department of Revenue (collectively "the Department"). The petition seeks review of the Florida Supreme Court decision reported at 676 So.2d 1362 (Fla. 1996).

I. STATEMENT OF THE CASE

This case involves the constitutionality of a state sales tax assessment against the mail order sales of Share, a non-resident corporation. The issue was decided in favor of Share by the lower courts in light of the rulings in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and other controlling precedent.

A. Factual Background

Share is a Texas corporation which manufactures and sells chiropractic supplies consisting primarily of business forms and educational materials. The company is privately owned and operated by two individuals: Dr. James William Parker, who is the only employee of Share, and his son, Dr. William Karl Parker. Share conducts business out of its offices in Ft. Worth, Texas, and has no offices, agents, officers or employees in any other state.

Most of Share's business is conducted by direct mail through the use of catalogs and occasional fliers. A small amount, or approximately four (4%) percent, of Share's

gross sales each year result from products sold directly to physicians and doctors at educational seminars conducted by the Parker Chiropractic Resource Foundation ("the Foundation"), throughout the United States and Canada. The Foundation is an unaffiliated corporation owned by Dr. James Parker. Dr. Karl Parker is the vice president of the Foundation.

During the month of November in years 1986, 1987, 1988 and 1989, a Foundation seminar was held in Miami Beach, Florida (hereinafter referred to as "the seminars") each lasting three (3) days. Approximately 84% of the attendees at the seminar were from states other than Florida. Both James and Karl Parker were present at the seminars and served as speakers and coordinators on behalf of the Foundation. During the seminars, Share's products and supplies were displayed and available for purchase. No salespersons or employees of Share were present at the seminars to sell the products or solicit sales. Rather, Foundation employees were on hand to operate the cash registers and facilitate the transactions. Share registered with the Department, and collected and paid taxes to the State of Florida for sales made during the seminars. Share had no further contact with the State other than its direct mail activities.

In November of 1990, the Department conducted an internal audit of Share's operations for the period from December 1, 1985 through November 30, 1990. After the audit was concluded, the Department issued a tax assessment to Share in the amount of $77,933.98 for sales tax on those products sold within the State during the audit period by direct mail solicitation. A formal protest was filed by Share, but the assessment was affirmed. Share

thereafter filed its action for declaratory relief seeking to have the assessment declared unconstitutional.

B. Proceedings Below

After a full trial where all the evidence was presented, the lower court concluded that Share had no substantial nexus with the State of Florida and ruled the tax unconstitutional. This conclusion was based upon the lower court's interpretation of the *Quill* decision and other controlling precedent, as well as its finding that Share had no offices in the State of Florida, or any employees or agents permanently residing within the State. The trial court further found that neither the Parkers or Foundation employees were present within the State of Florida to solicit sales from its residents or exploit Florida's commercial market.

The Department appealed the trial court judgment, and the First District Court of Appeal affirmed. The appellate court held that the decisions of the United States Supreme Court, including *Quill*, supported the conclusion that a non-resident vendor must have a continuing presence within the taxing state before a substantial nexus will be found to exist. The court further held that the "bright line" test first enunciated in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and later adopted in *Quill*, simply creates a safe harbor, free from taxation, for those vendors who do no more than communicate with its customers by mail or common carrier, and does not conversely require automatic taxation if the vendor has limited additional

contacts with the taxing state. The appellate court certified the question to the Supreme Court of Florida.

The Supreme Court of Florida agreed with the appellate court's conclusions, both legal and factual, and adopted the opinion as its own. The Supreme Court held that, consistent with *Quill* and *Bellas Hess*, a vendor who does more than communicate by mail or common carrier with residents of the taxing state will be subject to a factual determination of whether its activities satisfy the substantial nexus test of the Commerce Clause. The Department has now filed the subject petition for writ of certiorari.

II. REASONS WHY THE PETITION SHOULD BE DENIED

The petition for writ of certiorari is without merit and should be denied because the decision below was correct and is entirely consistent with the applicable decisions of this Court. In addition, the state court cases cited by petitioners are factually distinguishable from the instant case and do not create a conflict with the decision below.

A. THE DECISION BELOW WHICH FOUND NO SUBSTANTIAL NEXUS BASED UPON THE FACTUAL FINDINGS OF THE TRIAL COURT DOES NOT CONFLICT WITH ANY DECISION RENDERED BY THIS COURT

The Department argues that the decision below conflicts with the prior rulings of this Court because the lower court improperly concluded that Share had no substantial nexus with the State of Florida even though it

did more than communicate by mail or common carrier with its customers in Florida, and was present within the State with the intent to further its business activities therein. The argument is erroneous for several reasons. First, the Department's argument misconstrues the prior rulings of this Court. Further, the argument ignores the express factual findings of the lower court. For these reasons alone, the petition must be denied.

The issue raised in this case is governed by *Quill*, which decision reaffirms the doctrines and principles set forth in *Bellas Hess*. Both of these cases involved constitutional challenges to a tax assessment against the sales of a non-resident vendor who sold its products to residents within the taxing state solely through direct mail solicitation. This Court held in each instance that the vendor must have a "substantial nexus" with the taxing state sufficient to satisfy the Commerce Clause of the United States Constitution thereby preventing an undue burden on interstate commerce. *Quill*, 504 U.S. at 309; *Bellas Hess*, 386 U.S. at 756, 758-759. As acknowledged by the Department, both the *Bellas Hess* and *Quill* decisions held that a vendor must have a "physical presence" in the taxing state before the "substantial nexus" requirement would be satisfied and the obligation of collecting and remitting sales taxes could be imposed. (Pet., pp. 10-11). The "physical presence" required must be determined in each instance, and will often turn on whether the vendor has a "small sales force, plant or office . . . " in the taxing state. *Quill*, 504 U.S. at 315 (*citing Scripto, Inc. v. Carson*, 362 U.S. 207 (1960)).

The *Quill* and *Bellas Hess* decisions also established a "bright line" ruling which created a "safe harbor" for

vendors who do no more than communicate by mail or common carrier with its customers in the taxing state. *Quill*, 504 U.S. at 315. Within the "safe harbor," a vendor would be immune from taxation and not subject to scrutiny under any type of physical presence analysis. *Quill*, 504 U.S. at 314-315. In other words, the "bright line" rule of *Quill* and *Bellas Hess* holds that the "substantial nexus" requirement of the Commerce Clause was not applicable if the vendor's activities fell within the "safe harbor," and any tax assessed under these circumstances would be deemed unconstitutional. *Id.* It follows from *Quill* that if the vendor was "physically present" within the state, the determination would then be made in each given case whether such "presence" constituted a "substantial nexus" to justify taxation. *Quill*, 504 U.S. at 315. The decision below correctly applied the doctrines of *Quill* and concluded that Share's limited activities in Florida did not support a finding of substantial nexus.

The Department completely misconstrues the holdings of *Bellas Hess* and *Quill* by arguing that any nonresident who does more than communicate with their customers by mail or common carrier falls outside the "safe harbor" and is subject to taxation. (Pet., p. 14). Stated another way, the Department asserts that "bright line" equals "state line," and if the border is crossed, a vendor has a substantial nexus with the state and is subject to taxation. (Pet., p. 15). The Department further argues that the decision below, by requiring more, improperly adopted a "substantial physical presence" test in conflict with the prior decisions of this Court. (Pet., pp. 14-16). The argument is erroneous.

First and foremost, the Supreme Court of Florida never adopted a "substantial physical presence" test as the Department suggests.[1] The Florida Supreme Court never mentioned the terms "substantial physical presence" in its opinion and never implied that this was the applicable test. The terms were also never invoked by any of the lower courts' decisions. The Department's attempt to attribute authorship of such terms to the Florida Supreme Court is false and misleading, and a futile attempt to create controversy and conflict where none exists.[2]

In addition, neither the *Quill* or *Bellas Hess* decision supports the Department's argument. In fact, the plain language of *Quill* suggests quite the contrary. As mentioned above, when discussing the bright-line test, this Court in *Quill* stated:

> Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or

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[1] The Department misquotes the words "substantial physical presence" numerous times throughout its petition. The first improper quote appears within the question presented. (Pet., p. i). The mischaracterization also appears at various places throughout the petition.

[2] The Department also complained that the decision below failed to establish guidelines as to what type of contacts or activities would establish substantial nexus in the state. The criticism is similar to the reproach of Justice White in his concurring and dissenting opinion in *Quill* where he stated that "[r]easonable minds surely can, and will, differ over what is required to make out a 'physical presence' adequate to justify imposing responsibility for use tax collection. *Quill*, 504 U.S. at 330-31 (White, J., concurring in part and dissenting in part).

> use tax *may turn on the presence in the taxing State of a small sales force, plant or office.*

Quill, 504 U.S. at 315 (*citing Scripto, Inc. v. Carson*, 362 U.S. 207 (1960)). From this language it is plainly clear that the Court never suggested that by merely crossing over the state line a vendor would subject itself to taxation. In fact, this Court specifically rejected this notion when it stated that substantial nexus could not be found where only the "slightest presence" or insubstantial activity occurred within the taxing state. *Id.*, at n. 8 (*citing National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551 (1977); *see also Miller Bros. Co. v. State of Md.*, 347 U.S. 340 (1954) (periodic delivery of products in taxing state not enough to constitute substantial nexus).

The Department further argues that because Share entered the State of Florida with the intent to further its business activities therein, its presence created a substantial nexus with the State. (Pet., pp. 14-15). The argument lacks legal and factual support. Even assuming, *arguendo*, that the intent of Share was relevant to the inquiry, the facts of this case preclude a finding that Share was within Florida for the purpose of exploiting its market presence therein. Indeed, the trial court specifically concluded:

> [T]he [Foundation] employees did nothing to further Share's market presence within the State of Florida. The [Foundation] employees merely collected money from paying customers, and did not solicit further customers while in the state . . . [M]ost of the chiropractors present at the seminar were from out of state, and had been long-standing customers of Share. . . .

> Thus, there was no 'exploitation of the consumer market' in Florida by these employees. . . .

Thus, as the trial court correctly found, Share did not enter the State of Florida for the purpose of furthering its business activities therein or expanding its market presence in the State.

Pursuant to the above, no conflict exists between the decision below and this Court's controlling precedent. As a result, no basis or justification exists for accepting jurisdiction over this matter, and the Department's petition for writ of certiorari should be denied.

B. THE STATE COURT DECISIONS RELIED UPON BY THE DEPARTMENT ARE FACTUALLY DISTINGUISHABLE FROM THE INSTANT CASE AND NOT IN CONFLICT WITH THE DECISION BELOW

The Department also complains that the decision below conflicts with various state court opinions addressing the substantial nexus requirement of the Commerce Clause. Specifically, the Department argues that the "substantial physical presence" test adopted by the court below involves application of a subjective balancing test that was previously rejected by this Court and several other state courts addressing the issue. (Pet., pp. 14-16). The argument is flawed from several angles.

First, as discussed above, the Supreme Court of Florida never adopted a "substantial physical presence" test. *See infra*, at p. 7. Rather, the Supreme Court of Florida

properly recognized that the bright-line test first enunciated in *Bellas Hess*, and later reaffirmed in *Quill*, served only to create a "safe harbor" free from taxation for those non-resident vendors whose only connection with the taxing forum was its mail order sales. *Id.* The Florida court also understood that the "slightest presence" of the non-resident vendor in the taxing state, without more, would not be sufficient to establish a substantial nexus for taxing purposes. The court properly concluded that a substantial nexus is something more than a "slight presence" and would have to be determined based upon the factual findings of each given case. This conclusion reached resulted from a proper application of the test enunciated in *Quill*, and creates no conflict.

Like the Supreme Court in the decision below, many state courts since *Quill* have been faced with the inquiry as to whether a vendor's contacts with the state create a substantial nexus to justify taxation against the sales made to customers within the state. Each of these state courts applied the "substantial nexus" test set forth in *Quill*, as did the Florida Supreme Court, and made a determination based upon the facts presented. Because of the nature of the inquiry, each of these state court decisions are confined to their own facts and do not, and cannot, create any conflict with the decision below.

The Department cites to the decision of *Orvis Co., Inc. v. Tax Appeal Tribunal*, 86 N.Y.2d 165, 86 N.E.2d 954 (1995), *cert. denied, Vermont Information Processing, Inc. v. Commissioner*, ___ U.S. ___, 116 S.Ct. 518, 133 L.Ed.2d 426 (1995) to support its argument that a conflict exists which necessitates this Court's review. The *Orvis* decision, however, is easily distinguishable from the instant case. In that

case, two separate vendors were contesting the constitutionality of a sales tax assessment by New York authorities. With respect to the first vendor, the Orvis Company, the New York court found substantial nexus based upon the fact that the vendor unrefutedly had established a substantial wholesale business within the taxing state by use of its sales personnel who directly solicited retailers in New York. *Orvis*, 86 N.Y.2d at 179. Specifically, the evidence showed that during a three year period, salesmen of the Orvis Company traveled into New York on 12 separate occasions, visiting 9 to 16 customers on each trip, which resulted in an increased market presence in the state of approximately 15%, or $500,000 in new sales. *Id.* The *Orvis* court, based upon these facts, concluded that the "substantial nexus" requirement had been met. Its decision is entirely consistent with the decision below.

The second vendor, Vermont Information Processing, Inc. ("VIP"), created a substantial nexus with the State of New York by making more than 41 trips into the state to assist its customers and made approximately 154 sales transactions during these troubleshooting trips. *Id.*, at 180-181. The evidence showed that unlike the facts in this case, the visits by VIP "enhanced sales and significantly contributed to [its] ability to establish and maintain a market for [its products] in New York." *Id.* Thus, based upon these facts, the *Orvis* court concluded that the vendors had more than a "slight presence" within the taxing state to justify taxation. There is nothing inconsistent about the *Orvis* decision in relation to the decision below.[3]

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[3] Although the *Orvis* court suggests that it is rejecting the test urged by the vendors because it would result in a case-by-

Likewise, the rulings in *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, 665 N.E.2d 795 (1996), *cert. denied* ___ S.Ct. ___, 65 USLW 3252 (Oct. 7, 1996), do not conflict with the decision rendered by the Florida Supreme Court. In fact, the *Brown's Furniture* decision is in accord with the reasoning and legal applications adopted by the Florida Supreme Court. The court in *Brown's Furniture* acknowledged that the question left unanswered after *Quill* was the extent of physical presence needed to establish substantial nexus. *Brown's Furniture*, 665 N.E.2d 795, 802. In addition, the Illinois court recognized that the substantial nexus inquiry was one where "reasonable minds surely [would] differ. . . . *Id.*, *citing Quill*, 504 U.S. at 315. With that said, the *Brown's Furniture* court concluded that the regular and frequent deliveries by the non-resident vendor into the taxing state was sufficient to justify a finding of substantial nexus. *Id.* The vendor in *Brown's Furniture* made 942 trips into the taxing state during a 10-month period, which equaled "between 15 and 18 trips into [the taxing state] per month, or a minimum of about one every other day." *Brown's Furniture*, 665 N.E. 2d at 803. Most importantly, the court made reference to the decision below when it concluded that the contacts were not " 'occasional' or sporadic." *Brown's Furniture*, 665 N.E.2d at 804, *citing Florida Dept. of Revenue v. Share Int'l., Inc.*, 667 So.2d 226 (Fla. App. 1995), *rev.*

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case evaluation of the burdens imposed, the court's opinion reflects that such a review was implemented. For example, the court looked to both the contacts of each vendor and their effect on the vendors' market presence in the State of New York before it concluded that a substantial nexus existed. *Orvis*, 86 N.Y.2d at 179.

granted 668 So.2d 602 (Fla. 1996). Thus, the *Brown's Furniture* decision itself distinguishes the facts of *Share* from those before it. Surely, given this admission, the Department's argument that the *Brown's Furniture* decision creates any conflict with the decision below is futile.

The Rhode Island state court case cited by the Department is also easily distinguishable on its facts. *Koch Fuels, Inc. v. Clark*, 676 A.2d 330 (R.I. 1996), *cert. denied* ___ S.Ct. ___, 65 USLW 3288 (Oct. 15, 1996). In that case, the court found that a substantial nexus existed because the transactions sought to be taxed were consummated within the taxing state of Rhode Island. No such facts exist in the present case. Here, the Department is seeking to tax the mail order sales made by Share to customers within Florida, which sales were undisputedly consummated in Texas. Share paid taxes on all sales that were made during the seminars in Florida.[4] Moreover, in *Koch*, the court concluded that the vendor maintained "total control" over the 25.6 million gallons of fuel oil which it shipped into the taxing state, which was valued at approximately $18 million. The court's conclusion of

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[4] The Department also asserts in its petition that during the seminars Share took orders in Florida for later delivery in the state. (Pet., p. 6). Nowhere within the record of this case do facts exist that support the Department's assertion. In fact, the record is clear that Share paid taxes on all sales consummated in the State of Florida, (R-172). Many doctors at the seminars would, however, submit an order form that would later be accepted and filled in Texas to avoid the burden of transporting the materials back to their home state themselves. (R-176; R-185-186). There is no evidence to show that doctors from Florida acted in this manner.

substantial nexus was based upon these facts, and in no way conflict's with the findings of the decision below.

In summary, a review of the state court decisions relied upon by the Department in support of its petition reveal that each court made a factual determination that the substantial nexus requirement had been met and that the challenged tax was therefore constitutional under the Commerce Clause.[5] These decisions, rather than create a conflict, support the conclusion that the substantial nexus requirement must be resolved based upon the facts of each given case as mandated by the *Quill* decision.

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[5] The only other state court decision cited by the Department in its petition is the Kansas case of *In the Matter of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996). The Department acknowledges that the case is not applicable to the issues raised in its petition. However, the Department does note that the *Book Clubs* court made a finding of substantial nexus consistent with *Quill*. The ruling was made based on the court's conclusion that the non-resident vendor was conducting business in the taxing state through an in-state sales force of teachers who were engaged to solicit the students on a continuing basis throughout each given year. *Book Clubs*, 920 P.2d at 958. We do not have anything close to this type of presence in the instant case.

III. CONCLUSION

For all of the foregoing reasons, the Department's petition for writ of certiorari should be denied.

Respectfully submitted,

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